IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 74.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

Appellants,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS,

Respondents.

MOTION BY APPELLANTS FOR LEAVE TO FILE MEMORANDUM IN RESPONSE TO THAT FILED BY THE FEDERAL COMMUNICATIONS COMMISSION.

Now come the appellants and ask leave of the Court to file the attached memorandum, commenting on the memorandum filed since the argument by the Federal Communications Commission.

C. M. BRACELEN,
ALAN J. McBEAN,
WILLIAM D. MITCHELL,
Counsel.

Of counsel:
CHAS. T. RUSSELL,
EDWARD L. BLACKMAN.

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MEMORANDUM BY THE APPELLANTS COMMENTING ON THE MEMORANDUM FILED BY THE FEDERAL COMMUNICATIONS COMMISSION.

A study of the memorandum filed by the Federal Communications Commission results in the conclusion that it is a wholly unsatisfactory proposal in the following respects:

1. It is not merely th interpretation of an ambiguous provision of the order, but calls for special orders of the Commission in conflict with express provisions of the regulations.

It thus accomplishes in effect an amendment to the rules, and we believe that amendments should be effected as the law provides by order of the Commission and not by any proposal made by the Commission in court.

2. The proposal or pledge of the Commission as to what it proposes to do, being inconsistent with the scheme of the published order, will leave the whole matter of depreciation with respect to purchased property in the greatest confusion.

3. The proposal of the Commission still fails to prescribe any rule or standard either for accountants or to control or guide the action of the Commission.

We concede that in case of an ambiguous rule it is competent for the Commission to suggest an interpretation acceptable to the Court which would make the ambiguous rule as so interpreted satisfy the requirements of the law. The appellants suggested such a solution in respect of that part of the controversy covered by paragraph III of our brief, which arose because of an ambiguity as to whether spare plant should be classified by the accountants under the head of "Plant in Service" or "Plant Held for Future Use". We made that suggestion because our point about the rules affected was that they were ambiguous.

Quite a different situation is presented in connection with the proposal of the Commission pertaining to account 100.4. Our contention there is that the rules are not ambiguous, but as drawn they are arbitrary and not within the authority granted by the statute.

We have the following comments to make about the proposal:

(a) The rules as drawn make the so-called original cost to the first dedicator the basis for entries in the plant accounts and the basis for computing

depreciation on depreciable plant. This point was brought to the front by the question asked of the Attorney General by Mr. Justice Roberts. That question was, Supposing the price paid for property acquired from another utility company was less than the original cost, would the original cost, being more than the price paid, be left in plant accounts? The Attorney General answered that it would, but that the difference between the price paid and the original cost would be entered as a credit, not a debit, in the adjustment account. This answer was correct as far as it went, but it is obvious that the original cost, even though in excess of the price paid, thus remains in the plant accounts, constituting by the express terms of the order the basis for computation of depreciation on tangible property. This fact confirms our assertion that the fundamental theory of the system as promulgated makes the original cost, whether more or less than the price paid, the basis for depreciation accounting.

(b) The Commission proposes that it will grant under paragraph (C) of account 100.4 the equivalent of depreciation under the guise of amortization. When amounts paid by the accounting company have been finally determined "to be definitely attributable to depreciable telephone plant" the Commission says it will provide for their amortization through account 613 or account 675. Account 613 (R. 186) is for amortization of intangible property, and covers only "franchises, patents leaseholds and similar intangible property." None of these items is included in the "classes of depreciable telephone plant" which the Commission has prescribed (R. 120) pursuant to the mandate of Section 220(b) of the Act. To charge to this account the depreciation on amounts which have

been held to be "definitely attributable to depreciable telephone plant" would require an amendment of the system. Account 675, Other Expenses, covers only "operating expenses not properly chargeable to other accounts." Depreciation on amounts "definitely attributable to depreciable telephone plant" is necessarily properly chargeable to the depreciation account, and account 675 excludes it by its terms. Depreciation account 608 would not thus truly show at any time the depreciation allowed on tangible property and the depreciation reserve account 171 would not truly show at any time the full provision for depreciation on tangible depreciable property.

(c) Under the published order, part of the price paid for property purchased from other utilities would go into plant accounts and part into the adjustment account. The proposal of the Commission still takes no account of the fact that when property is retired it should be dropped out of both accounts and thus it would be necessary in the case of retirement of every item of property, any part of the cost of which was entered in the adjustment account, for the Commission to make a special order allowing retirement from the adjustment account simultaneously with retirement from the plant accounts.

The accounting for property retired is prescribed by Instruction 25 (R. 112-113) and provides that when an item is retired its original cost shall be written out of the plant accounts (the 200 series, which in total make up account 100.1). It makes no provision for writing out of account 100.4 the difference between the original cost and the actual cost of the item retired. It cannot be that by saying "provision will be made" the Commission means

that separate provision will be made in the case of each retirement. Individual poles, telephones and similar items are being retired every day and will soon run into the millions. Such items are indistinguishable as between those purchased from a predecessor utility and those initially provided by the accounting company (R. 340, 341). In the nature of the case, the only provision that can be made is to provide an accounting rule, applicable to all transactions of a specified kind, which the companies themselves can and will be required to apply in the keeping of their accounts. Such a rule has not been made, and if made would necessarily constitute an amendment to the system.

Moreover, under the system as it stands (even if paragraph (1) of the Government's memorandum should be regarded as a part of it) a company's total investment could not be ascertained from its accounting balances by adding accounts 100.1, 100.2, 100.3 and 100.4, after the first day, because thousands of items of property are being retired daily, and there is no provision for writing out of these accounts anything except their "original cost".

(d) The proposal makes no suggestion as to what standard the Commission would apply in determining whether under the circumstances of the particular case amounts in account 100.4 may be deemed to represent an investment in tangible property. The Commission in its argument seems to have rejected the system heretofore followed by the I. C. C. that there shall not be entered in the plant accounts any portion of the price paid in excess of the "structural value" of the tangible property acquired, and yet it does not indicate in its proposal what standard will be applied. It still has failed to prescribe any rule

or standard either to guide accountants or the action of the Commission.

(e) The record shows (R. 336) that the appellant companies in the Bell Telephone System have, during the last twenty years, made more than 100,000 purchases of property from other utilities. The proposal involves a separate determination with respect to each of these past transactions as well as all future purchases before the accountants can make any final disposition of them.

We do not feel justified in burdening the Court with a further analysis of the situation resulting from the Commission's proposal. We think it is too clear to be controverted that the published order makes the original cost, whether more or less than the price paid, the basis for entries in the plant account for plant investments and for computation of depreciation; that the provision for amortization as an intangible of an item in the adjustment account was never intended by these rules to be used as a substitute for depreciation of depreciable property; that account 675, the alternative suggested in the proposal, is plainly inapplicable; that the use of the amortization provision as a substitute for depreciation of tangibles, confuses the accounts, placing the resulting charges under accounts intended for amortization of intangibles; and that the proposal still leaves the Commission unbound by any rule or principle in dealing with items in account 100.4. We cannot escape the conclusion that the proposal which the Commission makes with respect to the use of the amortization as a substitute for depreciation allowances is in direct conflict both with the fundamental scheme relating to original cost and with specific provisions of the

rules, and that what the Commission proposes constitutes amendments unsatisfactory in themselves and not interpretations of ambiguities and that amendments should be made by Commission order and not by assurances or pledges made in court. The Commission should make rules on which the accountants may act. If the accountants misinterpret or misapply the rules it should then be open to the Commission to make orders interpreting and applying them, but the proposal to leave the rules silent as to the disposition of entries relating to important transactions with the power to the Commission to dictate the entries to be made, is not in conformity with the letter or spirit of the statute.

Respectfully submitted.

C. M. Bracelen,
Alan J. McBean,
William D. Mitchell,
Counsel.

Of counsel:
Chas. T. Russell,
Edward L. Blackman.